NOTES

THE LAW SCHOOL.—The resgistration for the academic year 1921-22, the 168th of the University, reveals an increase of 96 over last year. As of October 1st, there are 632 students registered in the Law School.

The course in Bankruptcy and Insolvency, and in Pleading II, omitted during the year 1920-21, are offered this year by Professor Herman Oliphant, the former in the Winter Session and the latter in the Spring Session.

Two new courses have been placed in the curriculum. Trial Practice is being given by Professor Young B. Smith in the Winter Session; and Illegal Contracts and Combinations, will be offered by Professor Herman Oliphant in the Spring Session.

CONTRIBUTORY NEGLIGENCE OF CHILDREN.—In the recent case of *Lederer* v. *Connecticut Co.* (1920) 95 Conn. 520, 111 Atl. 785, a boy under the age of six without looking rode his tricycle from the sidewalk on to the car tracks, and was killed by a car negligently managed by the defendant. The lower court charged that the boy was required to use such care as reasonably prudent boys of a similar age would use under the circumstances; also, that if the boy knew he was doing a dangerous thing and yet ran in front of the car, verdict should be for the defendant. *Held,* this is ground for reversal. An immature child is required to use only such care as the average child of similar age, judgment, and experience would under the circumstances. Knowledge of the danger does not show negligence if the plaintiff acted like others of a similar capacity.

This case necessarily implies that a child below the age of six might conceivably be guilty of contributory negligence. But there is considerable authority holding that, as a matter of law, a child under the age of six cannot be charged with negligence.[1] Some jurisdictions go even further, raising the age limit to seven,[2] and eight,[3] while others would restrict it to five[4] or four.[5] All alike explain the rule by the legal fiction of a "conclusive presumption" that children below the set age cannot exercise any kind of care.[6] The courts were probably influenced in their judgment by a similar rule in criminal law where minors below seven are deemed incapable of committing crimes. Yet there is a fundamental difference between the situation in the two cases. An act is not criminal unless it was done with the *mens rea.* The person charged with the crime must have the ability of distinguishing right from wrong.[7] Clearly a

[1] *Pascagoula etc. Co.* v. *Brondun* (1909) 96 Miss. 28, 50 So. 97. The problem is differently phrased in New York, by asking when a child becomes *sui juris.* It reaches that period when it becomes capable of taking care of itself. Until that time the negligence of its guardian may be imputed to it. See *Jacobs* v. *Koehler Sporting Goods Co.* (1913) 208 N. Y. 416, 418, 102 N. E. 519.

[2] *Dodd* v. *Spartenburg etc. Co.* (1913) 95 S. C. 9, 78 S. E. 525; *Richardson* v. *Nelson* (1906) 221 Ill. 254, 77 N. E. 583; see *McDermott* v. *Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445, 451; *Levine* v. *Railway* (1903) 78 App. Div. 426, 429, 80 N. Y. Sup. 48.

[3] *Erie Ry* v. *Swiderski* (C. C. A. 1912) 197 Fed. 521.

[4] *Eskildsen* v. *Seattle* (1902) 29 Wash. 583, 70 Pac. 64.

[5] *Hamilton* v. *Morgan etc. S. S. Co.* (1890) 42 La. Ann. 824, 8 So. 586.

[6] Georgia reasons oddly enough that children below seven are incapable of exercising due care, because they cannot distinguish right from wrong. *Rhodes* v. *Georgia etc. Co.* (1889) 84 Ga. 320, 10 S. E. 992.

[7] 1 Bishop, *New Criminal Law* (8th ed.) 219.

child below the set age is ordinarily incapable of that. And although there may be exceptional children yet it might well be the policy of the state to discountenance prosecutions of children, finding that it is more desirable to check their criminal propensities in other ways. No such consideration operates in a purely private action between two individuals.[8] It is here, where the equities of the parties are to be adjusted, that exceptional children should be considered. Though immature children generally have not enough intelligence and discretion to warrant their being held accountable for their actions, any one infant in a particular situation may have. It should always be open to the defendant to prove that, regardless of the plaintiff's age. To preclude him is to work an injustice. The defendant need only prove that the infant was cognizant of the immediate consequences of the acts he did, and that the consequences are usually sufficient to deter a person of his age and experience from doing it. If then he does it, the infant should be held liable.[9]

The basis of the doctrine of "conclusive presumption" is that these children are incapable of exercising discretion, of acting according to rule. They are bundles of instincts and impulses. No regularity of conduct can be expected from them. Hence to be consistent, no one is justified in expecting any definite reactions. Yet the conduct of a child is not irrelevant in considering unavoidable accident.[10] We escape this contradiction and reach a logically correct conclusion by admitting the fact that children at various ages up to seven do respond in a definite fashion, according to their experience. If the plaintiff doesn't, we can charge him with contributory negligence. Clearly it would be exceedingly difficult to establish this, for very little discretion can be required from minors of tender years; but even that little may be lacking, and the opportunity of establishing it should be given.

Again following the analogy of the criminal law some jurisdictions raise a rebuttable presumption of incapacity for exercising due care in a case of minors from seven to fourteen.[11] The burden of proving that the child has the

---

[8] This distinction is exemplified by the rule that if a child or an insane person does what in a sane or mature adult would amount to negligence, and that results in injury to the plaintiff, the child or lunatic is liable. No heed is taken of their actual mental condition which precludes moral culpability. "If one of two innocent persons must suffer a loss, he should suffer who has caused it." *Williams* v. *Hays* (1894) 143 N. Y. 442, 38 N. E. 449 (insane person); see 450, 451 (infants); 1 Shearman & Redfield, *Negligence* (6th ed.) 313.

[9] Concretely, if a child of six playing on the city streets sees an automobile approaching, realizes that painful injuries result from being run over by it, nevertheless instead of avoiding it as a child of his age would, recklessly continues playing, the negligence of the child should be a good defense to an action brought by him against the motorist for the latter's negligence.

A few cases lay down the rule that in every case the child's capacity is to be determined by the jury, unhampered by any presumptions of law, purely on its merits. *Bachelor* v. *Degnon etc. Co.* (1909) 131 App. Div. 136, 115 N. Y. Supp. 93; see *Central etc. Co.* v. *Rylee* (1891) 87 Ga. 491, 494, 13 S. E. 584. We can trust the common experience of jurymen not to set too rigorous a standard for ascertaining the child's capacity.

Some courts appear to have arrived at this practical result by a backstairs way. They say that when the defendant shapes his conduct relying on the assumption that the child will act in the way a child of his age usually does, and the child doesn't, and is injured in consequence, the defendant cannot be charged with negligence. Hence the question of contributory negligence does not arise at all. This is reaching a just result illogically. *Hestonville Ry.* v. *Connell* (1879) 88 Pa. 520; *Morse* v. *Consolidated Ry.* (1908) 81 Conn. 395, 71 Atl. 553; see *Adams* v. *Nassau Ry.* (1899) 41 App. Div. 334, 58 N. Y. Supp. 543.

[10] See *Adams* v. *Nassau etc. Ry.*, *Hestonville Ry.* v. *Connell*, *Morse* v. *Consolidated Ry.*, *supra*, footnote 9.

[11] *Birmingham etc. Co.* v. *Landrum* (1907) 153 Ala. 192, 45 So. 198; *United States Natural Gas Co.* v. *Hicks* (1909) 134 Ky. 12, 119 S. W. 166. In New

understanding and ability rests on the defendant.[12] Most courts, as seems the better rule, allow no presumption after the minimum age.[13] It is assumed that the child has the capacity and the burden of showing contributory negligence or freedom from it, is the same as in the case of adults. After the age of fourteen, the authorities are uniform in holding that there is no presumption of incapacity.[14]

The problem in each case is how would a child of the plaintiff's age usually act? But the term "age" is used psychologically, rather than chronologically. The child's physical condition, his training, his experience, his discretion are considered.[15] The result may be to place him in an age group below his chronological or above. If the psychological age is below seven in jurisdictions where seven is the minimum age for the capacity of taking care, the child could probably not be charged with negligence, though no cases precisely in point have been found.[16] Suppose on the other hand that a child whose chronological age is six has the general capacities of an eight year old. Courts would generally apply the minimum age rule, strictly, and hold that as a child is below seven years of age, the question of his intelligence and discretion could not be allowed to arise.[17] Under all circumstances the point is that the child must conduct himself not like children generally, but like children having a corresponding mental development. Thus, the standard of conduct in the age of a child differs from the adult standard. The adult must act like a reasonably prudent person under the circumstances.[18] Mankind is split into prudent and imprudent and the plaintiff to recover must have conducted himself like one of the former. The child, however, need act only as the average child of the psychological class usually does.[19]

This distinction arises consistently out of the whole doctrine of contributory negligence of children. Children being creatures of impulse, it is unfair to penalize infants who act like most of their kind for not acting like the minority,—the prudent children. If it be argued that children are relatively capable of restraint and moderation, the answer is that at a tender age this relative ability amounts to practically nothing, and at later ages, it is taken care of by the rule that children must act in a way that is reasonably to be expected from one of their capacity and experience.

York it has been held that the presumption continues until twelve. *Grealish* v. *Brooklyn, etc. Ry.* (1909) 130 App. Div. 238, 114 N. Y. Supp. 582; *contra, Bachelor* v. *Degnon, etc. Co., supra,* footnote 9.

[12] *Tucker* v. *Buffalo Cotton Mills* (1906) 76 S. C. 539, 57 S. E. 626.

[13] *Berdos* v. *Tremont etc. Mills* (1911) 209 Mass. 489, 95 N. E. 876; *Hepfel* v. *St. Paul etc. Ry.* (1892) 49 Minn. 263, 51 N. W. 1049 (*semble*); *Wabash Ry.* v. *Jones* (1905) 121 Ill. App. 390 (*semble*).

[14] *Fortune* v. *Hall* (1907) 122 App. Div. 250, 106 N. Y. Supp. 787; *Baker* v. *Seaboard etc. Ry.* (1909) 150 N. C. 562, 64 S. E. 506.

[15] *Grealish* v. *Brooklyn, etc. Ry., supra,* footnote 11. An instruction to the jury which required it to judge the conduct of a boy of nine by what could be reasonably expected of a boy of his age, and ignored capacity, held proper ground for reversal. *Linder* v. *Brown* (1912) 137 Ga. 352, 73 S. E. 734; *Western Ry.* v. *Young* (1888) 81 Ga. 397, 7 S. E. 912; *Wabash Ry.* v. *Jones, supra,* footnote 13.

[16] It seems that in Alabama "normal" children above the age of fourteen are conclusively presumed to be capable of negligence. See *Cedar Creek Store Co.* v. *Stedham* (1914) 187 Ala. 622, 625, 65 So. 984. This leaves the question still open as to a fourteen year old child having the intelligence of a seven year old through retarded development.

[17] See *supra,* footnote 1.

[18] *Salter* v. *Utica etc. Ry.* (1882) 88 N. Y. 42.

[19] *Fink* v. *Kansas City Ry.* (1912) 161 Mo. App. 314, 143 S. W. 568; *Kehler* v. *Schwenk* (1891) 144 Pa. St. 348, 22 Atl. 910.

Suppose the child is sixteen and has the faculties of the normal adult? Quite in line with their whole attitude, courts hold that the adult standard applies.[20] It is not the age in years and months that count, but mental development. This rule is desirable for where one is capable of exercising the same care as an adult, he should be required to.

The principle case is in accord with our discussion. The facts of the case are submitted to the jury—the tender age of the child not preventing the consideration of the question of contributory negligence. The standard applied is not the arbitrary one of chronological age, but the psychological one—"age, judgment and experience." Finally, the child must act not like some other prudent infant, but like the average of his psychological age.

RECOGNITION OF EQUITABLE INCUMBRANCE IN ACTION AT LAW UPON COVENANT AGAINST INCUMBRANCES.—An incumbrance, within the terms of a covenant against incumbrances, has frequently been defined as any right to or interest in the land to the diminution of its value, consistent with the passage of the fee.[1] Easements,[2] liens[3] and restrictive covenants[4] have all been held to fall within the category of incumbrances.

A covenant against incumbrances is a promise that the land is not in any way incumbered at the time the covenant is made, and so, like a warranty of a chattel, if it is broken at all, it is broken as soon as it is made.[5] The cause of action for a breach accrues at the time of the making of the covenant,[6] but subsequent events may be put in evidence to show what were the damages then incurred in fact.[7] No new right of action arises when a money incumbrance, such as a lien, is paid off by the covenantee, but it is not till then that the damages resulting from its existence are ascertained.[8] Unless the grantee can show substantial damages in some such way, he can recover only nominal damages.[9] Where a subsisting easement is alleged as the incumbrance, the injury arising from the easement, or a reasonable price paid by the grantee in extinguishing it, is the measure of damages,[10] as in this manner the difference between the value of the land with the incumbrance and without it[11] can best be determined. Furthermore, in New York and by the weight of authority elsewhere, the fact

---

[20] *Binder* v. *Chicago City Ry.* (1912) 175 Ill. App. 503; *Frauenthal* v. *Laclede Gas Light Co.* (1896) 67 Mo. App. 1.

[1] *Prescott* v. *Trueman* (1808) 4 Mass. 627, 629; *Huyck* v. *Andrews* (1889) 113 N. Y. 81, 85, 20 N. E. 581; *Fraser* v. *Bentel* (1911) 161 Cal. 390, 119 Pac. 509; 2 Tiffany, *Real Property* (enlgd. ed. 1920) 1675; Rawle, *Covenants* (5th ed. 1887) §§75, 76; *Simons* v. *Diamond Match Co.* (1909) 159 Mich. 241, 247, 123 N. W. 1132.

[2] *Weiss* v. *Binnian* (1899) 178 Ill. 241, 52 N. E. 969; *Harrington* v. *Bean* (1897) 89 Me. 470, 36 Atl. 986; *cf. Scriver* v. *Smith* (1885) 100 N. Y. 471, 3 N. E. 675.

[3] Maupin, *Marketable Title* (1896) 287.

[4] *Fraser* v. *Bentel, supra,* footnote 1. But unless the restriction interferes with a use of the property otherwise lawful, it is no incumbrance. *Clement* v. *Burtis* (1890) 121 N. Y. 708, 24 N. E. 103. Also a valid municipal "building-zone" ordinance is not an incumbrance. See (1920) 20 COLUMBIA LAW REV. 803; *Lincoln Trust Co.* v. *Williams Bldg. Corp.* (1920) 229 N. Y. 313, 128 N. E. 209.

[5] *McGuckin* v. *Milbank* (1897) 152 N. Y. 297, 302, 46 N. E. 490.

[6] *Clark* v. *Swift* (Mass. 1841) 3 Metc. 390, 392.

[7] *Bailey* v. *Agawam Nat. Bank* (1906) 190 Mass. 20, 76 N. E. 449.

[8] See *Tibbets* v. *Leeson* (1888) 148 Mass. 102, 104, 18 N. E. 679; *Post* v. *Campau* (1879) 42 Mich. 90, 3 N. W. 272.

[9] *McGuckin* v. *Milbank, supra,* footnote 5.

[10] See *Prescott* v. *Trueman, supra,* footnote 1, p. 630.

[11] *Huyck* v. *Andrews, supra,* footnote 1, p. 91.